BLANK

PAGE

FILE COPY

Office - Supreme Court, U.
FILED
OCT 25 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1937.

No. 528

PACIFIC NATIONAL COMPANY,

Petitioner,

v.

GALEN H. WELCH, former Collector of Internal Revenue for the Sixth District of California,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

MELVIN D. WILSON,
819 Title Insurance Bldg., Los Angeles,
Counsel for Petitioner.

Parker & Baird Company, Law Printers, Los Angeles.

BLANK

PAGE

SUBJECT INDEX.

PAGE

Opinions Below 4

Jurisdiction 4

Question Presented 4

Statutes and Regulations Involved 4

Statement 4

Specifications of Error to Be Urged 8

Reasons for Granting the Writ 8

Conclusion 12

Certificate of Counsel 12

Brief in Support of Petition 13

Argument 13

I.

The statute is permissive only, and the regulations do not require an election 13

II.

If there were an election in the regulations, it would only apply when the method first used clearly reflected net income 15

III.

There can be no election without a knowledge of the inconsistent remedies 21

IV.

The question involved is of such importance that a writ of certiorari should be granted 22

Appendix—Statutes and Regulations Involved 25

TABLE OF AUTHORITIES CITED.

CASES. PAGE

Continental Bank & Trust Co. of N. J. v. United States, 19 Fed. Supp. 15 11

Ives Dairy, Inc., 23 B. T. A. 579, 65 Fed. (2d) 135, 12 A. F. T. R. 498 ..... 11, 17, 19

Kaplan v. United States, 18 Fed. Supp. 965 ..... 9, 20

Key Largo Shores Properties, Inc., 21 B. T. A. 1008 ..... 11, 15

Lucas v. Sterling Oil & Gas Co., 62 Fed. (2d) 951, 10 A. F. T. R. 255 ..... 11, 17

Lucker v. United States, 53 Fed. (2d) 418, 10 A. F. T. R. 664 ..... 11, 17

McDonald v. Commissioner, 52 Fed. (2d) 920, 10. A. F. T. R. 511 17

Morrow Becker & Ewing, Inc. v. Commissioner, 57 Fed. (2d) 1, 10 A. F. T. R. 1491 ..... 8, 17, 18, 21

Patent Royalties Corp. v. Commissioner, 65 Fed. (2d) 580, 12 A. F. T. R. 842 ..... 11, 17

Pictorial Review Co. v. Helvering, 68 Fed. (2d) 766, 13 A. F. T. R. 594 17

Queen City Woodworks & Lumber Co. v. Crooks, 7 Fed. Supp. 684, 14 A. F. T. R. 158 ..... 11, 17

Richmond Hosiery Mills v. Rose, 73 Fed. (2d) 315 11

Standard Oil Company v. Hawkins, 74 Fed. 395 ..... 10, 21

Tide Water Oil Co., 29 B. T. A. 1208 11

United Profit Sharing Corp. v. United States, 66 Ct. Cl. 171 11

MISCELLANEOUS.

"Alexander Tax News Letter," (issue of Aug. 20, 1937) 22

STATUTES

PAGE

Judicial Code, Sec. 240 (a) 4
Regulations 74, Art. 352 26
Regulations 74, Art. 353 ..... 14, 27
Revenue Act of 1926, Sec. 44 6
Revenue Act of 1928 ..... 10, 18
Revenue Act of 1928, Sec. 44 ..... 6, 13, 14, 25

TEXT BOOKS AND ENCYCLOPEDIAS.

20 Corpus Juris 37 21

BLANK

PAGE

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1937.

No. .....

PACIFIC NATIONAL COMPANY,

Petitioner,

v.

GALEN H. WELCH, former Collector of Internal Revenue for the Sixth District of California,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit entered in the above-entitled cause on August 2, 1937, affirming the judgment of the United States District Court in and for the Southern District of California, Central Division.

Opinions Below.

The United States District Court did not render a written opinion. A minute order was made, finding for the defendant [R. p. 31]. The opinion of the Circuit Court of Appeals [R. pp. 198 to 207, inclusive] is not yet reported in the Federal Reporter system.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on August 2, 1937 [R. p. 207]. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925.

Question Presented.

When a taxpayer, through ignorance of a right to use any other basis, files its 1928 return on a basis which does not clearly reflect its net income, is it bound by the method so used?

Statutes and Regulations Involved.

The statutes and regulations involved will be found in the Appendix hereto, pp. 25 to 27.

Statement.

This case involves a suit for the recovery of corporate Federal income tax for the year 1928 in the amount of $9,669.89, paid by the petitioner to the respondent on the basis of a return in which installment sales of real estate were reported as completed or cash sales and results from the refusal of the Commissioner of Internal Revenue to permit a change to the installment basis.

Around July 1, 1927, petitioner purchased the parcel of land here involved, located on the edge of Culver City, California, on the outskirts of Los Angeles, for $309,000.00 cash and $300,000.00 in notes secured by the land [R. pp. 68-9; p. 44]. Petitioner conveyed title to this property to Pacific National Bank, as trustee, and became the sole beneficiary of the trust, which was numbered P. T. 46 [R. p. 68].

The trustee tried to sell the property in lots through conservative methods and for reasonable prices, but was unable to make many sales [R. pp. 2, 6, 115, 161].

Petitioner then employed Frank J. Brick as sales agent, who doubled and tripled the asking prices of the lots over the previous asking prices, and was to receive a commission of thirty-five per cent., plus one-half of the excess of the selling price over specific asking prices [R. pp. 54-67], in comparison with commissions of fifteen to twenty per cent. previously offered [R. pp. 2, 141].

Mr. Brick had a large sales organization and used the "free lunch and lecture" system, extravagant statements, and high-pressure closers [R. pp. 110, 117]. He sold many lots, beginning late in 1927, and throughout 1928 [R. p. 144], and for about three times their value [R. pp. 117-118].

Out of $265,961.22 received from sales in 1928, the amount of $255,854.45 was payable as commissions. The cost of the land and improvements sold in 1928 was $414,608.91. Trustee's fees of more than $13,298.00 were payable [R. pp. 153, 91].

As of December 31, 1928, six per cent. of the sales contracts had been cancelled, forty per cent. were delin-

quent in principal, taxes or interest, or two or more of these items [R. p. 143]. Subsequently, over eighty per cent. of the 1927 and 1928 buyers cancelled their contracts and failed to make their payments [R. pp. 117-144].

Petitioner was not, by the terms of the trust indenture, to receive anything from the trust until all commissions, trutee's fees, note indebtedness and interest, improvement and other costs, had been paid [R. p. 79]. These costs were not paid as of December 23, 1931, when petitioner transferred the beneficial interest in the trust to Transamerica Corporation, in part payment of a guarantee obligation [R. p. 124]. Consequently, petitioner never received anything from the trust, and hence did not ever recover any of its cash investment of $309,000.00, and did not receive anything in the way of income. In fact petitioner was required to put $50,000 more cash in the trust in 1928 [R. p. 112].

Most of the lots were sold for a down payment of twenty-five per cent. and the balance over a period of years [R. pp. 108, 55]. The average collection in the year of sale was, for 1928 sales, thirty-two per cent. [R. p. 153].

The Revenue Act of 1926 (Sec. 44) provides that if the collections during the year of sale exceeded twenty-five per cent. of the selling price, the sale could not be treated as an installment sale. The 1928 Act (Sec. 44), however, provided that sales could be reported on the installment basis, provided the collections in the year of sale did not exceed forty per cent. of the selling price.

Petitioner's books, however, were kept and its returns prepared by Mr. Shelton, an inexperienced young man,

who received no advice or assistance from anyone [R. pp. 107, 110, 111, 113, 114, 123].

In preparing the 1928 return, Mr. Shelton reported therein as 1928 transactions the 1927 sales, as well as the 1928 sales [R. p. 108], and made other errors [R. pp. 42, 48].

Mr. Shelton did not know about the more liberal provisions of the 1928 Act, and did not know that petitioner was permitted to report on the installment basis, or on the deferred payment plan [R. p. 108]. He understood that the sales were required to be treated, on the books and returns, as cash or completed sales. He got this impression from looking at some book of Regulations [R. p. 108].

The method of accounting and bookkeeping adopted by Mr. Shelton reflected a net income from the trust for 1928 of $137,001.17. This exceeded by $89,677.34 the losses of $47,329.84 sustained by petitioner from its other operations, and a tax of $10,761.28 was paid [R. pp. 41, 2].

After the filing of the return the Commissioner refunded $1,091.39, on account of depreciation and depletion deductions not claimed by Mr. Shelton in the return [R. pp. 42, 48]. The Commissioner refused to refund the remainder of the tax on the ground that petitioner had made a binding election and could not change from the completed to the installment basis [R. p. 16].

It is stipulated that if the income of the trust is computed on the installment basis, there would be a refund due [R. p. 118]. The delinquent return filed by the trustee shows that the entire tax paid would be refund-

able, if the trust income is computed on the installment basis, as the trust income of $15,073.46 would be much less than petitioner's loss from other operations of $47,329.83 [R. pp. 151, 52].

It is further stipulated that no income will escape taxation, by reason of the running of the statute of limitations, if petitioner is permitted to change to the installment basis [R. p. 118].

Specifications of Error to Be Urged.

The court below erred:

In holding that the use of a method of reporting which did not correctly reflect net income, through ignorance of the statutory right to employ another method, constituted a binding election, estopping petitioner from using a statutory method which does correctly reflect net income.

Reasons for Granting the Writ.

1. The decision of the court below is in conflict with *Morrow, Becker & Ewing, Inc., v. Commissioner,* 57 Fed. (2d) 1, 10 A. F. T. R. 1491, decided by the Circuit Court of Appeals for the Fifth Circuit. In that case a real estate company bought a tract of land in Florida and sold all the lots in 1925, mostly on the installment basis. By the end of the year one-sixth of the contracts were in default, as the value of the land was declining. The sales were reported in the return as completed sales, and the Commissioner refused to accept an amended return on the installment basis. The 1926 Act. was passed shortly before the 1925 return was filed, authorizing the use of the installment basis, and retroactively ratifying

the Commissioner's regulations permitting such basis in the absence of statutory provisions therefor in the earlier acts. The court permitted the amended return, as the method originally used did not clearly reflect net income and the taxpayer had scant notice of the provisions of the recently enacted 1926 Act.

In the case at bar, forty per cent. of the contracts were delinquent at the end of the taxable year. Furthermore, the regulations under the 1928 Act were not promulgated until February 15, 1929, and were not available to petitioner when the 1928 return was filed. The 1928 Act changed the method of reporting available to petitioner, but petitioner had no knowledge of it, and had but scant opportunity of examining the regulations under the act.

2. The decision of the court below is in conflict with *Kaplan v. U. S.*, 18 F. Supp. 965, decided by the United States Court of Claims. In that case the taxpayer made a casual sale of personal property, receiving less than forty per cent. of the selling price in the year of sale—1929. This was an installment sale but was reported as a completed sale. The Commissioner rejected a claim for refund filed on the installment basis, claiming that the taxpayer had made a binding election. In 1932, the unpaid purchase price was reduced $75,000.00, which reduced the profit the taxpayer could realize on the transaction and resulted in the original return reflecting an erroneous income. The Court of Claims reversed the Commissioner on two grounds, first, that neither the law or regulations contained a provision for an election with respect to casual sales of personal property, and, second, that there can be no binding election in using a method which does not clearly reflect net income.

In the instant case, neither the statute nor the regulations permitting vendors of real estate to report on the installment basis contain an election. In this case also, the method employed in the original return does not clearly reflect net income.

3. The decision of the court below is in conflict with *Standard Oil Company v. Hawkins,* 74 Fed. 395, decided by the Seventh Circuit. In that case the appellant deposited money in a national bank on the day the bank ceased business and when its officers knew it was hopelessly insolvent. Appellant, ignorant of its right to reclaim the deposit on the ground that it had been fraudulently received, filed a claim as an unsecured creditor. The claim was allowed and a dividend tendered thereon. Appellant then learned of its other right and brought an action to reclaim. The court held that appellant had not made a binding election, as there must be a knowledge of the inconsistent rights before an election can be made.

In the instant case, petitioner was ignorant of a right, granted it in the recently enacted Revenue Act of 1928, to file on the installment basis when the collections in the year of sale exceeded twenty-five per cent., but did not exceed forty per cent. of the selling price. Under such circumstances, petitioner could not have made a conscious or binding election.

4. The court has decided an important question of Federal law which has not been, but should be, settled by this Court.

The question of whether a taxpayer who uses a method which does not correctly or clearly reflect net income, can be estopped by the theory of election of remedies from

using a more favorable method provided by the law, when the law does not contain such an election and the regulations do not clearly contain one, is an important question which has not been, but should be, decided by this Court.

Following is a partial list of cases involving this or a closely analogous point, and which indicate that the decision of the court below is in conflict with the weight of authority:

Key Largo Shores Properties, Inc., 21 B. T. A. 1008;

Tide Water Oil Co., 29 B. T. A. 1208;

United Profit Sharing Corp. v. U. S., 66 Ct. Cl. 171;

Pichmond Hosiery Mills v. Rose, 73 Fed. (2d) 315;

Continental Bank & Trust Co. of N. J. v. U. S., 19 Fed. Supp. 15;

Lucas v. Sterling Oil & Gas Co., 62 Fed. (2d) 951;

Patent Royalties Corp. v. Commissioner, 65 Fed. (2d) 580;

Queen City Woodworks & Lumber Co. v. Crooks, 7 Fed. Supp. 684;

Lucker v. Commissioner, 53 Fed. (2d) 418;

Ives Dairy, Inc., 23 B. T. A. 579, 65 Fed. (2d) 135.

The question is an active one and the decision in the court below adds to the confusion.

Unless reviewed, it will probably be productive of further litigation.

Conclusion.

Wherefore, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MELVIN D. WILSON,
819 Title Insurance Building,
Los Angeles, California,
Counsel for Petitioner.

October, 1937.

Certificate of Counsel.

I hereby certify that the foregoing petition is well founded and not interposed for delay.

MELVIN D. WILSON,
Counsel for Petitioner.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1937.

No. .....

PACIFIC NATIONAL COMPANY,

Petitioner,

v.

GALEN H. WELCH, former Collector of Internal Revenue for the Sixth District of California,

Respondent.

BRIEF IN SUPPORT OF PETITION.

To avoid duplication, this brief is limited to argument, since the formal statements required by the rules appear *ante* as part of the Petition.

ARGUMENT.

I.

The Statute Is Permissive Only, and the Regulations Do Not Require an Election.

Section 44 of the Revenue Act of 1928 merely permits taxpayers, under certain conditions, to report sales of property on the instalment basis. It does not state that a binding election will be made if one or the other method is used. It does provide that the use of the installment basis will be subject to the conditions prescribed by the Commissioner in his regulations.

Article 353 of Regulations 74, promulgated under the Revenue Act of 1928, deals with the sale of real property on the installment plan. That regulation does not appear to contain any requirement that a binding election be made. It merely says that the vendor may use the installment method of reporting, but if he chooses, as a matter of consistent practice, to report on the accrual or cash basis, such a course is permissible.

A reading of that regulation would appear to lead one to conclude that:

1. Any qualified vendor may use the installment basis, but—

2. Only the qualified vendor who can show a consistent practice can use the accrual or cash basis.

Any election in a regulation should be carefully explained, with a statement as to the time limit for making the election, the acts deemed a definite commitment, and the consequences of the election as to the particular taxable periods and future periods.

Petitioner submits that there is no binding election in the regulation, but if there is one, it is so obscure that it should be ignored.

Since there is no election in the statute, the regulations should not be permitted to require one, unless the regulations are clear and explicit—which is not the case here.

If there is no election to prevent petitioner from using the installment basis, it should only be prevented by some general doctrine of estoppel. But it has been stipulated that no income will escape taxation if petitioner is permitted to change its basis of reporting, so no basis for estoppel exists.

II.

If There Were an Election in the Regulations, It Would Only Apply When the Method First Used Clearly Reflected Net Income.

The object of the law and regulations is to require both the taxpayer and the Commissioner to so compute the items of gross income and deductions as to clearly reflect the correct net income under all the circumstances of each case. Where the original return correctly reflects the net income, the taxpayer is ordinarily barred from subsequently choosing a more beneficial method. However, where the method originally chosen does not correctly reflect the net income, the taxpayer is not barred from subsequently using a method which does correctly reflect net income, even though the result is to lessen the tax.

This rule is well stated by the Board of Tax Appeals in *Key Largo Shores Properties, Inc.*, 21 B. T. A. 1008, 1011, as follows:

> "The respondent contends that, the petitioner having elected a particular method of reporting income, the election is binding and it cannot afterward choose a different basis. As authority for this position he cites *R. Downs, Jr.*, 5 B. T. A. 1029; Gilbert W. Lee, 6 B. T. A. 135, and other cases in which taxpayers were denied the right to change the basis of reporting income.
>
> "The cited cases either presume or decide that the method first employed by the taxpayer served to reflect the true income and proceed on the theory that in such cases it is in the interest of administrative expediency to require adherence to the method first elected. There is no doubt considerable to be said in favor of the argument made because to permit

taxpayers to change at will the basis of reporting income merely because subsequent events might produce a lower tax under one method than under another would result in an ever widening circle of confusion in the computation of taxes, with consequent delay in closing out tax cases.

"The chief foundation of the rule applied in the above cases, namely that the first elected method correctly reflected income, does not exist in the present case, as a glance at the facts will clearly show."

The Board in that case cited facts which showed that the taxpayer, selling real estate in the Florida land boom, would not be able to collect the obligations of the buyers and hence should not consider them in the computation of profit.

On page 1012, the Board further said:

"Under the Revenue Acts various methods of reporting income may be adopted by taxpayers, but all are designed to correctly reflect the true income in order that a just tax may be levied and collected. If a method used by a taxpayer does not clearly reflect income, the respondent may determine the income according to a method which in his opinion does clearly reflect it. Section 212, Revenue Act of 1926. This in itself is sufficient to demonstrate that it was not intended that taxpayers should be irrevocably bound by the election of a method of reporting when that method is erroneous. The effect in this case of requiring adherence to the basis originally adopted by the taxpayer would be to set up and tax, as income, an amount which in fact is not income. Neither administrative rules nor the forceful arguments in

favor of administrative expediency can create income where in fact there is none, and, after all, it is only income that is to be taxed. In our opinion the installment basis when applied to the facts in the present case does not reflect the taxpayer's income."

In the case at bar it is apparent from the record that the method used by petitioner did not correctly reflect the net income. Although petitioner never actually received a cent back from the trust venture throughout the time the beneficial interest in the trust was held, and the trust's correct 1928 income was less than appellant's loss from its own operations, petitioner's original return showed a net income from the trust of $137,007.17, which overcame its own loss and left a reported taxable income of $89,677.34.

Furthermore, it was readily discernible at the end of 1928 that petitioner would not get any income out of the trust.

In cases where taxpayers, in their original returns, chose methods which did not clearly reflect their income, the Board and courts have allowed them to subsequently change to methods which did reflect correct net income, although the effect was to reduce the tax. See *Morrow, Becker & Ewing, Inc., v. Commissioner,* 57 Fed. (2d) 1, 10 A. F. T. R. 1491; *McDonald v. Commissioner,* 52 Fed. (2d) 920, 10 A. F. T. R. 511; *Ives Dairy, Inc.,* 23 B. T. A. 579, 65 Fed. (2d) 135, 12 A. F. T. R. 498. For other cases in which circumstances were held warranted in relieving taxpayers of elections, but involving different types of adjustments, see *Pictorial Review Co. v. Helvering,* 68 Fed. (2d) 766, 13 A. F. T. R. 594; *Patent Royalties Corp. v. Commissioner,* 65 Fed. (2d) 580, 12 A. F. T. R. 842; *Queen City Woodworks & Lumber Co. v. Crooks,* 7 Fed.

Supp. 684, 14 A. F. T. R. 158; *Lucker v. U. S.*, 53 Fed. (2d) 418, 10 A. F. T. R. 664; *Lucas v Sterling Oil & Gas Co.*, 62 Fed. (2d) 951, 10 A. F. T. R. 255.

In *Morrow, Becker & Ewing, Inc., v. Commissioner*, 57 Fed. (2d) 1, 10 A. F. T. R. 1491, the taxpayer was selling its tract of Florida land. It sold the lots at boom prices on contract. By the end of the year some of the purchasers had defaulted and others were delinquent in payments of interest and taxes, and it was evident that the selling prices were too high. The company filed a return for 1925 on the completed basis, treating the contracts as having a value equal to their face value, and paid a tax of $35,013.43 thereon. The Revenue Act of 1926 had been passed eighteen days before the return was filed, and it permitted the installment basis of reporting where the initial payments did not exceed 25 per cent of the selling price of real property. The Regulations were promulgated some months after the return was filed. Thereafter, the company filed an amended return on the installment basis, showing a loss of $20,874.07. The Commissioner and Tax Board refused to accept the amended return. The Court held that the circumstances were sufficient to relieve taxpayer of its election. The court, on page 1493, said:

> "Taxes are assessed on income and not on honest mistakes of the taxpayer."

In the case at bar, the Revenue Act of 1928 was passed May 29, 1928, but the Regulations were not approved until February 15, 1929, and were printed and distributed

after that date. The 1928 Act permitted the use of the installment basis where the initial collections were not over 40 per cent of the selling price, whereas the 1926 Act authorized the installment basis only where the initial collections did not exceed 25 per cent of the selling price. Mr. Shelton, appellant's secretary, testified that he understood, from looking at some Regulation book, that the completed basis had to be used when the initial collections exceeded 25 per cent of the selling price [R. p. 108]. Obviously, Mr. Shelton had not yet received a copy of the Regulations promulgated under the Revenue Act of 1928, and was guided by the Regulations under the 1926 Act.

The other facts in the case at bar are similar to the facts in the above cited case, as the method originally employed in each case did not correctly reflect net income.

In *Ives Dairy, Inc.,* 23 B. T. A. 579, 65 Fed. (2d) 135, 12 A. F. T. R. 498, the taxpayer, selling land in Florida, reported on the installment basis. Before the Board of Tax Appeals it sought to change to the deferred payment basis; that is, to treat all amounts received as return of capital until the entire investment had been recovered and treat all subsequent collections as income.

The Board said (page 584):

> "Under ordinary circumstances, such a change is not permitted. We believe, however, that the principle announced in *Key Largo Shores Properties, Inc.,* 21 B. T. A. 1008, is applicable in the instant case. We there held that a taxpayer reporting an installment sale of real property might later change to the deferred payment basis when it had become

apparent during the taxable year that notes received in the transaction were worthless * * *.

"We, therefore, believe and so hold that the circumstances of the instant case justify a change as now contended by the petitioner."

The circumstances motivating the Board in allowing the change of basis, was the fact that the notes received on the sale had a face value of $177,325.00, but a fair market value of $20,000.00.

In the case at bar, also, the contracts were worth a great deal less than their face value.

In *Kaplan v. U. S.*, 18 F. Supp. 965, the Court of Claims decided a similar case. The property involved was personal property, but the law and regulations were similar. An installment sale was made, but was reported as a completed sale. Later, a claim for refund, based on the installment basis, was filed and rejected and suit brought thereon. The Commissioner defended on the ground that the taxpayer had made a binding election. The court held that there was no election in the law or Regulations. Furthermore, the contract price was reduced after the end of the taxable year, which reduced the profit. The court also held that there could be no election in any event, since the method originally used did not clearly reflect net income.

In all the cases cited by the court below, in the case at bar, the method of reporting clearly reflected net income. It is proper to hold a taxpayer to his original

choice between two correct methods, when subsequent events show that he did not choose the more favorable one. It is quite another matter to hold a taxpayer to a method which was wrong from the very beginning. In the one case, the doctrine of election prevents the taxpayer from disturbing the revenues merely for his own advantage. In the other case, the doctrine of election should not permit the Commissioner to bind the taxpayer to a mistake, and tax as income something which was not, in law or fact, income.

III.

There Can Be No Election Without a Knowledge of the Inconsistent Remedies.

Petitioner filed its return on the only method thought to be open to it. It did not know of another method which had shortly before been made available.

One of the elements of an election of remedies is that the party have knowledge of the two inconsistent remedies.

This rule seems well established, both in general law (20 *Corpus Juris* 37; *Standard Oil Company v. Hawkins,* 74 Fed. 395) and in Federal tax law (*Morrow, Becker & Ewing, Inc., v. Commissioner,* 57 F. (2d) 1).

The court below, in the case at bar, cited two Circuit Court cases to the contrary.

It would seem that the Circuit Courts are in conflict on this point also and the question should be settled by this Court.

IV.

The Question Involved Is of Such Importance That a Writ of Certiorari Should Be Granted.

In this case, the Circuit Court of Appeals has decided an important question of Federal law which has not, but should be, settled by this Court.

From the cases cited above, it is apparent that there is much litigation on the question of election of remedies in Federal tax matters, and that the Circuit Courts are in conflict and confusion over the matter.

That the decision below, unless reviewed, will cause greater confusion and be productive of more litigation, is indicated by the following comment appearing in the August 20, 1937, issue of "Alexander Tax News Letter," widely circulated:

> "CHANGE TO INSTALLMENT BASIS DENIED: COURT RULING APPEARS WRONG: Taxpayer sold realty with 25% cash deposit, balance in notes. It valued notes at market, thereby in effect using the 'deferred payment basis.' It requested permission to change to installment basis. Court denies right, concluding that when a return is filed there is a binding option, then court quotes 6 cases to that effect, as follows: Grant, 39 F. (2d) 340, Safety Prod. Co., 70 F. (2d) 439, Alameda Inv. Co., 33 F. (2d) 120, Pettigrew, 81 F. (2d) 666, Radiant Glass Co., 54 F. (2d) 718, and Moran, 67 F. (2d) 610. *Cases are not applicable.* The first and fourth involve 'joint return' of husband and wife (no change allowed beyond due

date after filing); the sixth involves estoppel, and the other three consolidated returns (no change specifically allowed by law after filing). (Pacific Natl. Co., CCA 9.)

"In Kaplan (Ct. Cls. Apr. 26, 1937) and Derbes, 69 F. (2d) 788, the courts allowed change to installment basis, where that method more truly reflected income. Installment basis is *permissive* with the taxpayer (Viault, 36 BTA No. 72—Aug. 6, 1937) and nothing whatsoever in the law prevents change to it, when income can be more truly reflected. Pacific Natl. case uses wrong precedents and should not be followed by those affected, unless and until other rulings appear."

It is therefore respectfully submitted that the Petition should be granted.

MELVIN D. WILSON,
819 Title Insurance Building,
Los Angeles, California,
Counsel for Petitioner.

October, 1937.

BLANK

PAGE

APPENDIX.

Statutes and Regulations Involved.

Section 44 of the Revenue Act of 1928 provides for the filing of returns on the installment basis as follows:

"(a) *Dealers in personal property.* Under regulations prescribed by the Commissioner with the approval of the Secretary, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit realized or to be realized when payment is completed, bears to the total contract price.

"(b) *Sales of realty and casual sales of personalty.* In the case (1) of a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year), for a price exceeding $1,000 or (2) of a sale or other disposition of real property, if in either case the initial payments do not exceed 40 per centum of the selling price, the income may, under regulations prescribed by the Commissioner with the approval of the Secretary, be returned on the basis and in the manner above prescribed in this section. As used in this section the term 'initial payments' means the payments received in cash or property other than evidences of indebtedness of the purchaser during

the taxable period in which the sale or other disposition is made."

"(c) *Change from accrual to installment basis.* If a taxpayer entitled to the benefits of subsection (a) elects for any taxable year to report his net income on the installment basis, then in computing his income for the year of change or any subsequent year, amounts actually received during any such year on account of sales or other dispositions of property made in any prior year shall not be excluded."

Article 352, Regulations 74, promulgated under the Revenue Act of 1928, reads in part as follows:

"Art. 352. *Sale of real property involving deferred payments.* Under Section 44 deferred-payment sales of real property fall into two classes when considered with respect to the terms of sale, as follows:

"(1) Sales of property on the installment plan, that is, sales in which the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable year in which the sale is made do not exceed 40 per cent. of the selling price.

"(2) Deferred-payment sales not on the installment plan, that is, sales in which the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable year in which the sale is made exceed 40 per cent. of the selling price.

"Sales falling within class (1) and class (2) alike include (a) agreements of purchase and sale which con-

template that a conveyance is not to be made at the outset, but only after all or a substantial portion of the selling price has been paid, and (b) sales where there is an immediate transfer of title, the vendor being protected by a mortgage or other lien as to deferred payments."

Article 353, Regulations 74, reads in part as follows:

"Art. 353. *Sale of real property on installment plan.* In transactions included in class (1) in Article 352 the vendor may return as income from such transactions in any taxable year that proportion of the installment payments actually received in that year which the total profit realized or to be realized when the property is paid for bears to the total contract price.

* * * * * * * * *

"If the vendor chooses as a matter of consistent practice to return the income from installment sales on the straight accrual or cash receipts and disbursements basis, such a course is permissible, and the sales will be treated as deferred-payment sales not on the installment plan."